

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES GINZKEY, RICHARD
FITZGERALD, CHARLES CERF, BARRY
DONNER, and on behalf of the class members
described below,

Plaintiffs,

v.

NATIONAL SECURITIES CORPORATION,
a Washington Corporation,

Defendant.

Case No. C18-1773RSM

ORDER DENYING DEFENDANT'S
FIRST MOTION FOR SUMMARY
JUDGMENT

I. INTRODUCTION

This matter comes before the Court on Defendant National Securities Corporation (“NSC”)’s first Motion for Summary Judgment, Dkt. #83. The Court has determined that oral argument is unnecessary. For the reasons stated below, the Court DENIES this Motion.

II. BACKGROUND

Defendant NSC is a registered securities broker-dealer “nominally headquartered in Washington state.” Dkt. #62 (“Troccoli Decl.”), ¶ 11. Plaintiffs James Ginzkey, Richard Fitzgerald, Charles Cerf, and Barry Donner used NSC’s services to purchase investments in a

1 company called Beamreach that produced solar panels for residential and commercial use. Dkt.
2 #1. Plaintiffs allege that NSC failed to conduct proper due diligence as required by rules set
3 forth by the Financial Industry Regulatory Authority (“FINRA”). *Id.*

4 As NSC understood it, Beamreach purported to be a high efficiency solar panel
5 manufacturer based out of California that was looking to raise funds to continue its development
6 of high yield solar panels. Dkt. #53-2 (“Troccoli Dep.”) at 99:5-9. Beamreach was looking to
7 raise money from “anybody and anyone that would invest.” *Id.* at 102:8-10. Beamreach
8 enlisted NSC as a placement agent to help it raise additional capital by introducing prospective
9 investors to the company. *Id.* at 48:4-6.

10
11 NSC is required to follow FINRA rules. *Id.* at 60:15-17. Under FINRA’s suitability
12 rule, NSC was required to have a reasonable basis to conclude the investment at issue was
13 suitable for at least some investors, and NSC was required to conduct reasonable due diligence
14 to provide it with an understanding of the risks and rewards associated with recommending a
15 security. *Id.* at 64:9-18. NSC has adopted and implemented this FINRA rule into its internal
16 policies and procedures. *Id.* at 64:19-22.

17
18 Pursuant to FINRA Rule 2111.05(a), NSC is required to perform reasonable due
19 diligence on a private placement prior to offering it for sale to its customers. FINRA Rule
20 2111.02 explicitly states that a broker-dealer cannot disclaim any responsibilities under the
21 suitability rule. FINRA provides investors an arbitration forum by which they can enforce these
22 rules. *See Luis v. RBC Cap. Mkts., LLC*, 401 F. Supp. 3d 817 (D. Minn. 2019) (citing FINRA
23 Rule 12200).

24
25 Plaintiffs have detailed many “red flags,” they allege NSC should have noticed about
26 Beamreach. *See* Dkt. #14 at 13–17. These red flags and a more substantive discussion of
27
28

1 Plaintiffs' negligence claim will be addressed in the Court's forthcoming order on NSC's
2 second Motion for Summary Judgment.

3 As outlined in the Complaint, in February 2015, NSC began acting as a placement agent
4 for Beamreach's Series D securities offering. The securities purchased by Plaintiffs and Class
5 Members in the Series D round consisted of preferred stock, beginning in February 2015 (the
6 "Series D Offering"). A secondary offering in June 2016, the Series D-1 preferred stock round,
7 was initially an equity offering (the "Series D-1 Offering") then was switched to a 9%
8 convertible promissory note offering a 300% "principal step up" in the event of an acquisition,
9 in November 2016 (the "Series D-2 Offering"). NSC acted as both the primary placement agent
10 and exclusive broker/dealer for the Beamreach Offerings. The total capital raised by NSC in the
11 Beamreach Offerings was approximately \$34.5 million. In the case of the Beamreach Series D
12 round, in which Plaintiffs participated, NSC earned a fee of 10% cash and 10% warrants for its
13 role as placement agent. *Id.* at 48:25-49:1. The brokers selling Beamreach to NSC clients
14 earned an allocation of the placement agent fee. *Id.* at 49:9-14.

15
16
17
18 The Beamreach Offerings were only made to "a limited group of sophisticated
19 'accredited investors' within the meaning of Rule 501(a) under the Securities Act of 1933 as
20 amended (the 'Securities Act'), in a private placement designed to be exempt from registration
21 under the Securities Act, and other applicable securities laws." Dkt. #20-1 at 2; Dkt. #20-2 at 2;
22 Dkt. #20-3 at 4. "Accredited investors" are defined by law as investors whose individual net
23 worth, or joint net worth with that person's spouse, exceeds \$1,000,000 or they have an annual
24 income exceeding \$200,000 in each of the two most recent years or joint income with their
25 spouse during those years in excess of \$300,000. *See* 17 C.F.R. §230.501(a)(5), (6).
26
27
28

1 The Series D and D-1 Offerings were presented to investors through private placement
 2 memoranda (“PPMs”). Dkts #20-1 and #20-2. The Series D-2 Offering was presented as a
 3 supplement to the Series D-1 Offering PPM (collectively, the PPMs and its supplements are
 4 identified as the “Beamreach PPMs”). Dkt. #20-3. In each PPM, NSC made warnings to
 5 investors about the high-risk nature of investing in Beamreach.
 6

7 Plaintiffs allege they relied on NSC’s “approval of the Beamreach Offerings for sale” to
 8 make their investments in Beamreach. Dkt. #1 at 25. On November 15, 2016, Plaintiff
 9 Ginzkey invested \$89,214.75 in the Series D-2 offering. On April 30, 2015, Plaintiff Fitzgerald
 10 invested \$175,000 in the Series D offering; on October 28, 2016, Fitzgerald invested \$12,745 in
 11 the Series D-2 offering. On February 9, 2016, Plaintiff Cerf invested \$52,479 in the Series D
 12 offering. On April 10, 2015, Plaintiff Donner invested \$149,940 in the Series D offering; on
 13 October 20, 2016, Donner invested another \$100,459 in the Series D-1 offering.
 14

15 On February 9, 2017, Beamreach filed for Chapter 7 bankruptcy citing a “catastrophic
 16 cash flow situation” and “loans due.” Plaintiffs’ investments resulted in a total loss. *See In re:*
 17 *Beamreach Solar, Inc.* 17-bk-50307, (N.D. Cal. Feb. 9, 2017).
 18

19 Plaintiffs filed this putative class action on December 10, 2018, asserting claims of
 20 negligence and unjust enrichment. Dkt. #1. Although Plaintiffs cite to FINRA to establish a
 21 standard of care for the negligence claim, they do not allege a breach of FINRA rules as a
 22 separate cause of action.¹
 23

24 On June 6, 2019, the Court denied NSC’s Motion to Dismiss the Complaint. Dkt. #28.

25 On April 27, 2021, the Court certified the Class and Sub-classes as follows:

26 **Beamreach Class**

27
 28 ¹ The Court has previously ruled on this point. *See* Dkt. #28 at 6 (“The Court notes that Plaintiffs are not pleading a cause of action under FINRA, but citing these rules to show duty and breach under their common law negligence claims.”).

1 All persons who invested in Beamreach Offerings (as defined
2 above) through the Defendant, at any time between February 6,
3 2015 and February 9, 2017 inclusive (the “Class Period”).

4 **Series D Sub-Class**

5 All persons who invested in Beamreach Series D (as defined
6 above) through the Defendant, at any time between February 6,
7 2015 and December 31, 2016 inclusive (the “Sub-Class D
8 Period”).

9 **Series D-1 Sub-Class**

10 All persons who invested in Beamreach Series D-1 (as defined
11 above) through the Defendant, at any time between June 1, 2016
12 and February 9, 2017 inclusive (the “Sub-Class D-1 Period”).

13 **Series D-2 Sub-Class**

14 All persons who invested in Beamreach Series D-1 (as defined
15 above) through the Defendant, at any time between October 1,
16 2016 and February 9, 2017 inclusive (the “Sub-Class D-2 Period”).

17 *See* Dkt. #66 at 4–5.

18 On December 23, 2021, NSC brought its first Motion for Summary Judgment, arguing
19 that New York law should apply in this case, that a private right of action cannot be brought
20 under FINRA, and that Plaintiffs’ negligence claim cannot circumvent the absence of a private
21 right of action under FINRA. Dkt. #83. NSC has also filed a second “merits-based” Motion
22 for Summary Judgment, Dkt. #96, which will be addressed by the Court later.

23 **III. DISCUSSION**

24 **A. Legal Standard for Summary Judgment**

25 Summary judgment is appropriate where “the movant shows that there is no genuine
26 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.
27 R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Material facts are
28

1 those which might affect the outcome of the suit under governing law. *Anderson*, 477 U.S. at
 2 248. In ruling on summary judgment, a court does not weigh evidence to determine the truth of
 3 the matter, but “only determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco*,
 4 *Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (citing *Federal Deposit Ins. Corp. v. O’Melveny &*
 5 *Meyers*, 969 F.2d 744, 747 (9th Cir. 1992)).

6
 7 On a motion for summary judgment, the court views the evidence and draws inferences
 8 in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Sullivan v. U.S.*
 9 *Dep’t of the Navy*, 365 F.3d 827, 832 (9th Cir. 2004). The Court must draw all reasonable
 10 inferences in favor of the non-moving party. *See O’Melveny & Meyers*, 969 F.2d at 747, *rev’d*
 11 *on other grounds*, 512 U.S. 79 (1994). However, the nonmoving party must make a “sufficient
 12 showing on an essential element of her case with respect to which she has the burden of proof”
 13 to survive summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

14 **B. Analysis**

15
 16 As an initial matter, the Court finds that Washington law applies to the substantive legal
 17 questions in this case. NSC now seeks to apply New York law. However, NSC has previously
 18 argued Washington law, *see* Dkt. #20 at 12 n.3, and the Court has not definitively ruled on this
 19 issue. Federal courts look to the forum state’s choice of law rules to determine the controlling
 20 substantive law. Under Washington’s choice of law rules, “[t]he rights and liabilities of the
 21 parties with respect to an issue in tort are [d]etermined by the local law of the state which, with
 22 respect to that issue, has the most significant relationship to the occurrence and the parties.”
 23 *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580 (1976). “Contacts to be taken into
 24 account . . . to determine the law applicable to an issue include: (a) the place where the injury
 25 occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile,
 26
 27
 28

1 residence, nationality, place of incorporation and place of business of the parties, and (d) the
2 place where the relationship, if any, between the parties is centered.” *Id.* at 580-81. NSC states
3 that fifty investors were located in New York and ten in Washington State. Dkt. #83 at 10. At
4 least some injury occurred in Washington State. The conduct causing the injury occurred in
5 New York and California, in the sense that the due diligence work occurred in those states.
6 Dkt. #85 at ¶ 3. NSC is headquartered in this district, and this is where the lawsuit was filed
7 and has proceeded for years prior to the instant Motion. Given the multiple locations of
8 Plaintiff investors and NSC’s operations, there was no center to the relationship between the
9 parties in this case. Given NSC’s prior reliance on Washington law, failure to have this case
10 transferred to New York, and all of the above, the Court will apply Washington law.
11

12
13 NSC repeats that there is no private right of action under FINRA. Dkt. #83 at 12. But
14 the Court has already ruled that Plaintiffs are not attempting to sue for a breach of FINRA
15 rules. *See* Dkt. #28 at 6 (“The Court notes that Plaintiffs are not pleading a cause of action
16 under FINRA, but citing these rules to show duty and breach under their common law
17 negligence claims.”).

18
19 NSC next argues that “courts have rejected efforts to shoehorn into FINRA suitability
20 rules a new tort of negligent due diligence.” Dkt. #83 at 13. NSC cites to a New York case,
21 *Fox v. Lifemark Sec. Corp.*, 84 F. Supp. 3d 239, 245 (W.D.N.Y. 2015), for the proposition that
22 “FINRA does not provide a private right of action, thus even if defendants violated FINRA
23 rules, plaintiff cannot recover for negligence based on the alleged violation of FINRA.” NSC
24 cites to many New York and neighboring state cases to argue there is a “majority rule” in its
25 favor. Plaintiffs cite to a Washington case, *Garrison v. Sagepoint Financial, Inc.*, 185 Wash.
26 App. 461 (Wash. Ct. App. 2015) where the Washington Court of Appeals found that FINRA
27
28

1 rules can be used as evidence of standard of care in a negligence case. Both parties cite to out-
2 of-state cases where courts have gone both ways on this issue.

3 This Court is inclined to apply Washington state law for the reasons stated above and
4 finds *Garrison* persuasive. Plaintiffs are citing to FINRA rules to set forth the standard of care
5 applicable to NSC under the circumstances in this case, which are analogous to the facts in that
6 case. Although the Court is not bound by the holdings in *Garrison*, the burden is on NSC here
7 to convince the Court that this claim should be dismissed. NSC cites no controlling law
8 preventing Plaintiffs' negligence claim from proceeding. Furthermore, Plaintiffs argue that
9 FINRA rules were incorporated into NSC's own internal policies which also inform the
10 applicable standard of care. This serves as an additional basis for Plaintiffs' negligence claim
11 to cite to these rules. *See* Dkt. #88 at 22 (citing NSC's 30(b)(6) deposition).
12

14 IV. CONCLUSION

15 Having considered the briefing from the parties and the remainder of the record, the
16 Court hereby finds and ORDERS that Defendant NSC's first Motion for Summary Judgment,
17 Dkt. #83, is DENIED.
18

19 DATED this 10th day of March, 2022.

20
21
22 

23 RICARDO S. MARTINEZ
24 CHIEF UNITED STATES DISTRICT JUDGE
25
26
27
28